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VISA Inc.

Before the Federal Communications Commission  
Washington, D.C. 20554  
In the Matter of Proposed Rule to the Telephone Consumer Protection Act  
**CG Docket No. 02-278; FCC 10-18**  
**COMMENTS OF VISA INC.**

May 21, 2010 – Loeb & Loeb, LLP is pleased to submit comments on behalf of its client, Visa Inc. (Visa), to the Federal Communications Commission (FCC) on the proposed rule CG Docket No. 02-278; FCC 10-18 regarding proposed revisions to the Telephone Consumer Protection Act (TCPA) which would require, for all calls to consumers, prior express consent in writing before consumers receive prerecorded telemarketing messages.

### **Summary**

On March 22, 2010, the FCC published a proposal to revise the TCPA to harmonize it with the Federal Trade Commission's (FTC's) amended Telemarketing Sales Rule that requires that prior express consent to receive a prerecorded telemarketing call be in writing. Visa supports the goal of harmonizing the FCC's telemarketing regulations with those of the FTC and supports the principles underlying the TCPA's regulation of wireless telephones and text messages sent to such mobile phones to protect against unwanted cost to the consumer, nuisance and to uphold consumer privacy. However, the proposed new restrictions on autodialed and prerecorded calls to wireless telephone numbers will have the unintended consequence of affecting consumers' ability to fully use the customary means of accessing the products and services of Visa and its clients, specifically with respect to those financial services that are customarily conducted over the telephone.

### **The Petitioner**

Visa Inc. is a global payments technology company that connects consumers, businesses, financial institutions and governments in more than 200 countries and territories, enabling them to use digital currency instead of cash and checks. Visa provides transaction-based services to its financial institution and merchant customers through VisaNet, its secure, centralized and global processing platform. Account-level relationships with consumers belong to Visa's network of financial institution clients and are managed by them.

In addition to providing its financial institution clients transaction-based services, Visa provides important services, including mobile transactional alerts, by which consumers can receive text messages (short message service or SMS) to their mobile telephones to help them manage their spending behavior and provide early detection to prevent fraudulent transactions on their accounts. Visa has developed the aforementioned transactional alerts service (Alerts Service)

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on behalf of its financial institution clients, who in turn make such service available to consumers.

## Discussion

### **I. THE PROPOSED RULE WILL PREVENT MANY CRITICAL SERVICES FROM BEING PROVIDED AND INCREASE THE COST OF THOSE CALLS THAT ARE MADE**

In order for Visa and its financial institution clients to continue to provide important services that benefit consumers, including permitting customers to make preference changes to their accounts, relying on oral permission, consistent with the guidance provided by the FCC for years, is critical. The costs and burdens imposed on financial institution clients in developing and maintaining systems to obtain such consents in writing, even those that are E-SIGN compliant, would be prohibitive and the customers' interests would not be served. These customers have an established relationship with Visa and its financial institution clients, have affirmatively consented to participate in the applicable service, expect to be contacted through the means they supply at the time of enrollment, and need a means to change certain of their contact and other information as they, the customers, direct, through a cost effective and efficient means.

### **II. THE PROPOSED RULE EXTENDS TO NON-TELEMARKETING ACTIVITIES AND THEREFORE GOES BEYOND THE GOAL OF HARMONIZATION WITH THE TSR**

The FTC's TSR applies only to telemarketing. Therefore, the stated goal of regulatory consistency does not require that the FCC impose the more burdensome prior written consent obligations to autodialed or prerecorded voice calls that are placed to consumers' mobile phones for non-marketing purposes. No change is required to the FCC's present treatment of non-telemarketing communications that are not subject to the TSR. The FCC should exempt calls that are non-commercial and commercial calls that "do not adversely affect the privacy rights of the called party" and that do not transmit an "unsolicited advertisement," aligning these types of calls with calls that are permitted to residential (wireline) telephone numbers using artificial or prerecorded messages.

### **III. NO EVIDENCE HAS BEEN PRESENTED THAT ORAL CONSENT WHEN PROPERLY OBTAINED IS AN INEFFECTIVE MEANS TO OBTAINING CLEAR AND CONSPICUOUS CONSENT**

Visa and its financial institution clients have long been guided by the FCC's position that prior express consent to permit delivery of autodialed or prerecorded voice calls to mobile telephone numbers may be given orally or in writing, and a business may contact customers at the mobile telephone numbers that are provided to that business by its customers.<sup>1</sup> There has been no evidence provided that oral consent provided by customers in the context of an existing relationship, particularly as it relates to services and other non-marketing activities, constitutes a

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<sup>1</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752 (1992) ("1992 TCPA Order") ¶ 31; *Rules and Regulations Implementing the Telephone Consumer Protection Act*, 23 FCC Rcd 559 (2008) ("ACA Declaratory Ruling") ¶ 1.



violation of any consumer privacy rights or proved otherwise invasive. Consumers have learned to rely on the option to telephone a customer service representative (CSR) who, after confirming a consumer's identity, may then act at the consumer's direction in matters like transferring money between accounts, setting up wire transfers from the consumer's account to a third party, learning account balances and even closing and opening accounts.

#### **IV. IF ENACTED, ORAL CONSENTS FOR CERTAIN CUSTOMER SERVICE ACTIVITIES SHOULD BE PERMITTED**

As noted above, businesses have long relied on oral consents based on the guidance provided by the FCC. If the proposed rule is applied, businesses must undertake prohibitively burdensome and costly efforts to recontact existing customers to obtain consents that were already secured, often at the direction of the consumers. There is substantial risk that many services that benefit the customers will have to be discontinued or substantially curtailed.

These curtailments will adversely affect consumers from getting what they have asked to be provided. And, it is important to bear in mind that if consumers of the Alerts Service or other similar services find that they no longer wish to receive such services or the calls, they can simply withdraw their approval.

The scale and cost of such a compliance effort will not be reduced by use of electronic signatures. Compliance with the E-SIGN Act carries with it its own compliance burdens and technical requirements that would add unnecessary complexity, particularly in the context of changing information under an existing relationship, as exists with the Alerts Service.

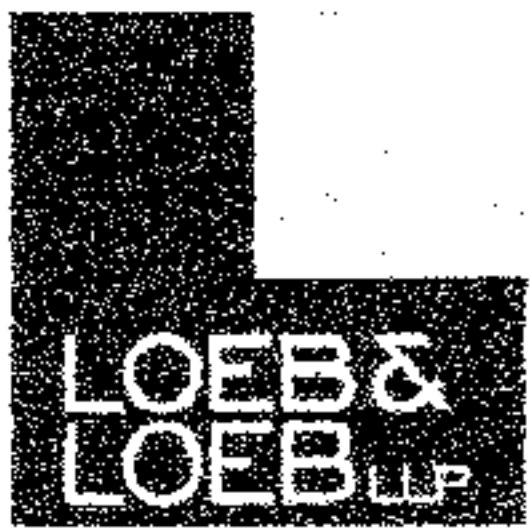
#### **V. THE PROPOSED RULE WOULD NOT ADVANCE THE TCPA'S PURPOSE OR PUBLIC POLICY**

The TCPA was written to protect consumers from intrusive and unwanted telemarketing calls. However, it did not contemplate the ways in which consumers use their mobile telephones today as their primary means of business and personal communication for a number of activities, including receiving information in managing their finances. Consumers who provide their wireless telephone numbers understand that they will receive calls from the business at the numbers they provide, and understand the costs associated both with having a wireless phone and the usage fees related thereto. A business that acts in accordance with this decision is not intruding unexpectedly on the consumers' privacy or imposing unexpected calling costs. Accordingly, as the FCC correctly decided many years ago, the intent of the statute is satisfied by the consumer's act of providing a wireless contact number to the caller.<sup>2</sup> In addition, consumers have the option of notifying the business, even after oral consent has been provided, if they do not wish to receive calls at the telephone number they provided, and therefore they are ultimately in control of whether information is delivered to the applicable wireless telephone.

The policy behind the TCPA and the proposed rule is guided by protection against consumers bearing unintended costs, avoiding nuisance and retaining best practices in consumer privacy. The foregoing principles are the very same foundation upon which Visa and its financial

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<sup>2</sup> *Id.*



institution clients provide many of their services in today's environment where consumers use their mobile phones as their primary communication devices.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "K. Florin", with a long horizontal flourish extending to the right.

Kenneth R. Florin  
Partner  
Loeb & Loeb LLP